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No. 06-1458

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MICHAEL GEDDES and KARI GEDDES,
individually and as parents and guardians of
ANDREW GEDDES, a minor child,

Petitioners,

v.

UNITED STAFFING ALLIANCE EMPLOYEE MEDICAL PLAN;
U.S.A. UNITED STAFFING ALLIANCE, L.L.C.,
a Limited Liability Company; and
EVEREST ADMINISTRATORS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS UNITED STAFFING ALLIANCE EMPLOYEE MEDICAL PLAN AND U.S.A. UNITED STAFFING ALLIANCE, L.L.C.

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STATEMENT PURSUANT TO RULE 29.6

Respondents, United Staffing Alliance Employee Medical Plan and U.S.A. United Staffing Alliance, L.L.C., have no parent corporations and no publicly held company owns 10% or more of the stock of either Respondent.

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Respondents United Staffing Alliance Employee Medical Plan and U.S.A. United Staffing Alliance, L.L.C., a limited liability company (collectively, "U.S.A.") file this Response in Opposition to Petitioners Michael Geddes and Kari Geddes, individually and as parents and guardians of Andrew Geddes, a minor child ("Petitioners") petition for writ of certiorari ("Petition") to the Tenth Circuit Court of Appeals.

SUMMARY OF REASONS TO DENY THE PETITION

The Petition should be denied for two reasons. First, Petitioners failed to demonstrate that the Tenth Circuit did anything other than apply the clear language of the ERISA statute to the Plan at issue, which permits delegation to non-fiduciaries.

Second, Petitioners have failed to demonstrate a circuit split of sufficient importance to merit a writ. Respondents contend herein that the Eleventh and Ninth Circuit decisions which Petitioners allege create a split of authority are distinguishable on the facts: they did not involve Plans which expressly provided for delegation of certain Plan functions to non-fiduciary claims administrators.

STATEMENT OF THE CASE

A. Statement of Facts.

Respondent U.S.A. United Staffing Alliance, L.L.C. created a medical benefits plan for its employees (the "Plan"), qualifying under the Employee Retirement Income Security Act of 1974, "ERISA," 29 U.S.C. §§ 1001-1461. (App., 4a). The Plan contained the requisite language taken from this Court's decision in *Firestone*, reserving discretion to the Plan fiduciary to determine benefits and to interpret the provisions of the Plan. (App., 5a). The Plan also expressly authorized the fiduciary to engage the services of a plan administrator ("Everest") to handle the voluminous number of medical claims and determinations of benefits required by the Plan. (App., 4a) [1].

Andrew Geddes was injured in a diving accident while on a church/boy scout outing to Lake Powell, Utah. (App., 2a). Andrew was medi-vac'ed via helicopter to the nearest hospital, St. Mary's, an out-of-network hospital under the Plan. (App., 2a). U.S.A. exercised the discretion reserved to it under the Plan by waiving pre-approval of the medi-vac and emergency surgery in the out-of-network hospital at St. Mary's. (Defendant's Opposition to Motion for Summary Judgment, p. 15, Docket # 25).

After surgery at St. Mary's in Colorado, Andrew's condition stabilized and he was transferred to Primary Children's hospital in Salt Lake City, where he underwent

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1. The language of the contract between U.S.A. and Everest included statements that Everest was not a fiduciary, but it did not — contrary to Petitioner's claim — contain any provision stating that Everest would "not have discretion."

no further surgery, and began his rehabilitation. (App., 3a). A portion of the billings for Andrew's care were denied by U.S.A. under the Plan under various exclusions, definitions, and limitations on coverage. (App., 4a).

Petitioners hired attorneys to dispute the determinations of coverage, and began to appeal the decision under the terms of the Plan. (App., 4a, 5a). However, during the pendency of the administrative appeal set forth in the Plan, Petitioners and their attorneys filed suit, thereby terminating the administrative appeal process. (App. 5a).

B. Proceedings Below.

After abandoning the administrative appeal process, Petitioners filed suit in federal district court, asserting that U.S.A.'s denial of benefits was improper under ERISA § 502(a)(1)(B) and (a)(3) and breach of fiduciary duty in violation of ERISA §§ 404(a) and 502(a)(3), and a violation of § 502(c)(1)(B) due to U.S.A.'s failure to provide requested Plan documents. The parties filed cross-motions for summary judgment. (App. 5a).

The district court granted summary judgment in favor of Petitioners on their first cause of action, and granted summary judgment to U.S.A. and Everest on claims two and three. (App. 5a). U.S.A. and Everest appealed the summary judgment in favor of Petitioners to the Tenth Circuit Court of Appeals.

The Tenth Circuit Court of Appeals held *inter alia* that U.S.A.'s designation of Everest as a third party administrator did not deprive U.S.A. of the deferential review set forth in *Firestone Tire and Rubber Co. v. Burch*, 489 U.S. 101 (1989).

REASONS FOR DENYING THE PETITION

I. THE TENTH CIRCUIT DECISION IS BASED ON THE PLAIN LANGUAGE OF THE ERISA STATUTE AND THIS COURT'S DECISION IN FIRESTONE.

The decision of the Tenth Circuit in this matter — that a deferential standard of review should be applied — is based upon the clear language of ERISA and this Court's decision in *Firestone*. This Court held in *Firestone* that when the ERISA health plan administrators and fiduciaries reserve discretionary authority to themselves in the plan document, a deferential standard of review applies. 489 U.S. at 115. It was uncontested at the District Court level and at the Tenth Circuit that the Plan documents reserved discretion to U.S.A. (App. 7a, 8a).

A. The Plain Language of ERISA Permits Delegation to Non-Fiduciaries Without Loss of Deferential Review.

The Tenth Circuit decision below followed the plain language of ERISA on the question of whether plan fiduciaries may delegate fiduciary responsibilities to non-fiduciaries:

> "The instrument under which a plan is maintained may expressly provide for procedures . . . (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities . . . under the plan." 29 U.S.C. § 1105(c)(1).

Here, the Plan document explicitly anticipates this delegation: "The Company will engage an independent claims administrator to administer the Plan, however, the Company makes all final

decisions about benefits paid from the Plan." (App. 7a, 8a)[2]. This statement in the Plan document is a clear implementation of Section 1105(c)(1)'s provisions. U.S.A. exercised the discretion reserved to it in the Plan through its independent claims administrator, Everest.[3]

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2. The Plan also provides wide discretion to the Plan fiduciary to determine eligibility and benefits. In the section entitled Claims, Appeals, and ERISA Rights, the following paragraph sets out the discretion accorded to the Plan's fiduciary:

> The Company will have the responsibility to make all final determinations regarding claims for benefits under the Plan, and will have the right to interpret the terms and provisions of the Plan. The Company also has the authority and responsibility to secure all information necessary to make factual determinations and apply all provisions of the Plan in a consistent and nondiscriminatory manner. The Plan requires that an individual appeal any claim denial through the process described in this section before seeking other legal alternatives.

(Docket # 18, Exhibit "A" to Buhler Affidavit, p. 34 Bates No. GED000039).

3. U.S.A. in fact exercised discretion numerous times with respect to Petitioner's claims. The Plan exercised the discretion granted by Plan documents by beginning coverage and payment immediately after the accident, even though there is strong evidence to suggest that the parties responsible for the trip should be primary and pay under the terms of the insurance carried by the trip sponsor. (Defendant's Opposition to Motion for Summary Judgment, p. 15, Docket # 25). The Plan exercised discretion in waiving pre-approval of the admission to St. Mary's in Colorado. *Id.* Furthermore, the Plan exercised discretion by enforcing the conclusion of Intracorp that pre-certification of inpatient hospital services after July 11, 2002 was denied. (Memorandum Opinion, p. 6). In each of these instances, USA, through its agent Everest, reviewed the evidence and plan terms, and exercised the discretion granted by the Plan documents.

B. Delegation To Non-Fiduciaries Is A Well-Settled Principle of Trust Law.

This Court's decision in *Firestone* is expressly premised on well-settled notions of trust law. *Id.* at 111 ("In determining the appropriate standard of review for actions under § 1132(a)(1)(B), we are guided by principles of trust law."). Under those principles, fiduciaries may delegate the performance of certain tasks, "which it is unreasonable to require him personally to perform." Restatement (Second) of Trusts § 171 cmt. d (1959). The fiduciary's inherent discretion to delegate aspects of trust administration to non-fiduciaries is further expanded where such delegation is explicit in the documents creating the trust. Restatement (Second) of Trusts § 171 cmt. j. (1959).

Trust law does not mandate that all entities administering a trust be fiduciaries, so long as the fiduciary remains personally liable for actions taken on its behalf by any of the non-fiduciary agents it employs to administer the trust. Restatement (Second) of Trusts § 225 (1959). The Tenth Circuit recognized the foundational nature of trust law to this Court's decision in *Firestone* in its holding on this issue:

> Decisions made by an independent, non-fiduciary third party at the behest of the fiduciary plan administrator are entitled to *Firestone* deference because the third parties act only as agents of the fiduciary. For purposes of liability, decisions made by third parties are decisions made by the fiduciary. If a plan administrator has been alloted discretionary authority in the plan document, the decisions of both it and its agents are entitled to judicial deference.

(App. 14a). The Tenth Circuit decision below was correctly decided on the basis of the plain language of the statute and well-settled principles of trust law. The Petition should therefore be denied.

C. The Opinion Below Correctly Absolved Everest of Liability.

The Tenth Circuit decision below correctly held that the Plan's delegee, Everest Administrators, was not liable to Petitioners under the plain language of the ERISA statute, reversing the trial court on this point. (App., 21a, 22a). The parties agreed at the district court level that Everest Administrators was not a fiduciary under the terms of the ERISA statute. (App., 21a). No circuit holds that non-fiduciaries, such as Everest, are liable under the terms of 29 U.S.C. § 1132(d)(2). (App., 22a, citing *Riordan v. Commonwealth Edison Co.*, 128 F.3d 549, 551 (7th Cir., 1997); *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir., 1993); *Curico v. John Hancock Mut. Life. Ins. Co.*, 33 F.3d 226, 233 (3rd Cir., 1994); *Daniel v. Eaton Corp.*, 839 F.2d 263, 266 (6th Cir., 1988)).

II. THERE IS NO SUBSTANTIVE CIRCUIT SPLIT REGARDING THE STANDARD OF REVIEW FOR MEDICAL BENEFITS DETERMINATIONS RENDERED BY PROPERLY DESIGNATED NON-FIDUCIARIES.

Though not raised by Petitioners below in support of their arguments, Petitioners now point to one Eleventh Circuit decision for the proposition that there is a split of authority among the circuits: *Baker v. Big Star Div. of the Grand Union Co.*, 893 F.2d 288 (11th Cir., 1989). That case involved a claim for permanent disability benefits under an ERISA disability plan, in contrast to the medical claims presented by Petitioners under the Plan in this case. After finding that the plan fiduciary had simply "rented" the claims facility of the insurer insuring the Plan, the *Baker* court found:

> Conversely, one who is not a fiduciary is also not "an administrator with discretionary authority" under 29 U.S.C. § 1002(16)(A) and (21)(A). "Administrators" are distinguished from "fiduciaries" by the former's lack of discretionary authority or discretionary control"; therefore, any entity or person found not to be an ERISA "fiduciary" cannot be an "administrator with discretionary authority" subject to the arbitrary and capricious standard.

Id. at 290. Subsequent decisions have looked upon the *Baker* as an anomaly, distinguishing it on the facts. *See, e.g., Briscoe v. Fine*, 444 F.3d 478, 489, (6th Cir., 2006); *Bouboulis v. Transport Workers Union of America*, 442 F.3d 55, 65 (2nd Cir., 2006); *Brown v. Blue Cross and Blue Shield of Alabama, Inc.*, 898 F.2d 1556, 1562 (11th Cir., 1990). The *Baker* decision is hardly the ground-breaking case that requires attention by this Court. Indeed, other 11th Circuit decisions demonstrate that *Baker* is not being followed even in the 11th Circuit. *Kirwan v. Marriott Corp.*, 10 F.3d 784, 788 (11th Cir., 1994).

Even those cases since *Baker* which have cited to it, cite it for other issues presented in that case: that Plan administrators are not subject to suit by virtue of being a claims facility, *See, e.g., Singleton v. Board of Trustees, of IBEW Local 613 and Contributing Employers Health and Welfare Fund.* 815 F.Supp. 448, 449, 450 (N.D. Ga., 1993); or that the determination of whether a given plan grants discretion is a question of law. *Blank v. Bethlehem Steel Corp.* 758 F.Supp. 697, 699 (M.D. Fla., 1990).

Furthermore, *Baker* is factually distinguishable from the present case. There is no indication whatsoever that the *Baker* decision involved an express delegation of authority as set forth in the Plan at issue here, where the Plan requires the delegation of authority to a third party. The Plan here provided:

> The Company will engage an independent claims administrator to administer the Plan, however, the Company makes all final decisions about benefits paid from the Plan.

(App., 7a, 8a). Similarly, there is no indication of such a clause delegating discretionary authority to a non-fiduciary in any of the other decisions such as *Madden, infra*, or the cases cited above. Therefore, the facts of *Baker, supra*, and *Madden, infra*, are distinguishable from the Plan at issue here because U.S.A.'s Plan included an express delegation to Everest, its independent claims administrator.

Petitioners also point to dicta in the Ninth Circuit opinion in *Madden v. ITT Long Term Disability Plan for Salaried Employees*, 914 F.2d 1279 (9th Cir. 1990), *cert. den.*, 498 U.S. 1087 (1991) to demonstrate that there is somehow a conflict amongst the circuits. However, a close reading of the dicta upon which Petitioners base this assumption demonstrates the fallacy of the assertion. Petitioner quotes *Madden* as follows:

> [W]here (1) the ERISA plan expressly gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan and (2) pursuant to ERISA . . . a named fiduciary properly designates another

> fiduciary, delegating its discretionary authority, the arbitrary and capricious standard of review applies to the designated ERISA-fiduciary as well as to the named fiduciary.

Petition, p. 13, quoting *Madden*, *supra*, at 1283-1284 (emphasis omitted). The Ninth Circuit in this quote articulated one of the permissible delegations of authority under 29 U.S.C. § 1105(c)(1) which entitle the decision to deferential review: delegation of discretionary authority to another fiduciary. But to then argue that the other method expressly permitted by 29 U.S.C. § 1105(c)(1) to delegate authority to non-fiduciaries are by this dicta excluded from deferential review stretches logic far too thin. Instead of demonstrating conflict between the circuits, these decisions are simply reiterating the express terms of ERISA that support Respondent's argument.

Again, there is no indication in the *Madden* decision that the ERISA plan at issue there contained an express delegation of discretionary authority to a non-fiduciary as is the case here. Like *Baker*, *supra*, *Madden* is clearly distinguishable on this basis, and therefore inapplicable to the determination of the standard of review here.

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the Petition. Therefore, U.S.A. respectfully requests that the Petition be denied.

Respectfully submitted,

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